

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

RAUL G. CANTU,	)	
	)	No. CV-08-00372-JPH
Plaintiff,	)	
	)	ORDER GRANTING DEFENDANT'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	(Ct. Rec. 20)
MICHAEL J. ASTRUE, Commissioner	)	
of Social Security,	)	
	)	
Defendant.	)	
	)	
	)	

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BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on August 14, 2009. (Ct. Rec. 17, 20). Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Leisa A. Wolf represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) On July 5, 2009, plaintiff filed a reply. (Ct. Rec. 22.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 20) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 17).

**JURISDICTION**

Plaintiff protectively filed an application for disability insurance benefits (DIB) on May 21, 2003, alleging neck spurs, emphysema, diabetes, arthritis, high blood pressure, and back

1 problems as of May 15, 2000<sup>1</sup>. (Tr. 50-52,68,87.) The application  
2 was denied initially and on reconsideration. (Tr. 31-33, 36-37.)  
3 At a hearing before Administrative Law Judge (ALJ), Paul Gaughen  
4 on May 17, 2006, plaintiff, represented by counsel, and vocational  
5 expert Tom Moreland testified. (Tr. 429-462.) On September 20,  
6 2006, the ALJ issued an unfavorable decision. (Tr. 20-25.) The  
7 Appeals Council denied plaintiff's request for review on March 12,  
8 2007. (Tr. 4-6.) Plaintiff appealed their decision. On January  
9 28, 2008, the district Court remanded for further proceedings.  
10 (Tr. 545-559.)

11 The ALJ held a second hearing on August 29, 2008. Plaintiff,  
12 represented by counsel, and vocational expert Deborah Lapointe  
13 testified. (Tr. 623-640.) On September 18, 2008, the ALJ issued a  
14 second decision finding plaintiff not disabled. (Tr. 476-483.) In  
15 the second decision the ALJ adopted and incorporated by reference  
16 his summary of the medical evidence from the prior decision,  
17 except to the extent it conflicted with the later findings. (Tr.  
18 479.) When the Appeals Council denied review on November 12,  
19 2008, the ALJ's decision became the final decision of the  
20 Commissioner, appealable to the district court pursuant to 42  
21 U.S.C. § 405(g). Plaintiff filed this action for judicial review  
22 pursuant to 42 U.S.C. § 405(g) on December 2, 2008. (Ct. Rec. 1,  
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24 The ALJ mistakenly cites onset as June 15, 2000 (Tr. 476),  
25 but in light of the record as a whole the error is harmless. An  
26 error is harmless when the correction of that error would not  
27 alter the result. See *Johnson v. Shahala*, 60 F.3d 1428, 1436 n.9  
28 (9<sup>th</sup> Cir. 1995). Further, an ALJ's decision will not be reversed  
for errors that are harmless. *Burch v. Barnhart*, 400 F.3d 676,  
679 (9<sup>th</sup> Cir. 2005) (*citing Curry v. Sullivan*, 925 F.2d 1127,  
1131 (9<sup>th</sup> Cir. 1991)).

1 4.)

2 **STATEMENT OF FACTS**

3 The facts have been presented in the administrative hearing  
4 transcripts, the ALJ's decisions, the briefs of both Plaintiff and  
5 the Commissioner, and are summarized here.

6 Plaintiff was 53 and 59 years old at onset and the first  
7 hearing, respectively. (Tr. 50, 435.) He has an eighth grade  
8 education. (Tr. 74, 436.) Plaintiff has worked as a manual  
9 laborer and truck driver. (Tr. 69,79.) At the first hearing,  
10 plaintiff testified he is limited in turning his neck and it is  
11 painful during winter, his lower back is stiff and painful, and he  
12 gets headaches every three days lasting about seven minutes. (Tr.  
13 439-441.) Both of his shoulders have been painful since 1988; both  
14 elbows have been very painful for 6-8 years. (Tr. 441-443.)  
15 Plaintiff has problems with numbness and grip with both hands. His  
16 breathing problems surfaced "in the early 80's." (Tr. 443-445.) He  
17 has problems sleeping and his knees "crack and snap." (Tr. 445-  
18 448.) Plaintiff can sit for 25-30 minutes, stand without leaning  
19 15 minutes, walk one block and lift 10-15 pounds. (Tr. 448-450.)

20 At the second hearing, plaintiff testified he can walk one  
21 block every two or three days and sit for 30 minutes. (Tr. 629,  
22 631.) He gets a severe headache lasting up to a minute every three  
23 to four days. (Tr. 630.) Plaintiff experiences throbbing pain in  
24 his neck "every now and then;" back pain and spasms; both  
25 shoulders and hands are "numb sometimes"; and, since the prior  
26 hearing, his breathing has worsened causing him to get about four  
27 hours of sleep nightly. (Tr. 629-633.) He vacuums, washes dishes,  
28 and cleans, all with rest periods. (Tr. 634.) Plaintiff worked

1 for five months as a long haul truck driver from August through  
2 December of 2005, and has not worked since because there is "too  
3 much dust around that agricultural area." (Tr. 634.) He later  
4 testified that he worked 3-4 weeks in the winter of 2006. (Tr.  
5 636-637.) Plaintiff last smoked when he was a teenager. (Tr. 630.)

#### 6 SEQUENTIAL EVALUATION PROCESS

7 The Social Security Act (the "Act") defines "disability"  
8 as the "inability to engage in any substantial gainful activity by  
9 reason of any medically determinable physical or mental impairment  
10 which can be expected to result in death or which has lasted or  
11 can be expected to last for a continuous period of not less than  
12 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The  
13 Act also provides that a Plaintiff shall be determined to be under  
14 a disability only if any impairments are of such severity that a  
15 plaintiff is not only unable to do previous work but cannot,  
16 considering plaintiff's age, education and work experiences,  
17 engage in any other substantial gainful work which exists in the  
18 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
19 Thus, the definition of disability consists of both medical and  
20 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
21 (9<sup>th</sup> Cir. 2001).

22 The Commissioner has established a five-step sequential  
23 evaluation process for determining whether a person is disabled.  
24 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
25 is engaged in substantial gainful activities. If so, benefits are  
26 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If  
27 not, the decision maker proceeds to step two, which determines  
28 whether plaintiff has a medically severe impairment or combination

1 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
2 416.920(a)(4)(ii).

3 If plaintiff does not have a severe impairment or combination  
4 of impairments, the disability claim is denied. If the impairment  
5 is severe, the evaluation proceeds to the third step, which  
6 compares plaintiff's impairment with a number of listed  
7 impairments acknowledged by the Commissioner to be so severe as to  
8 preclude substantial gainful activity. 20 C.F.R. §§  
9 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
10 App. 1. If the impairment meets or equals one of the listed  
11 impairments, plaintiff is conclusively presumed to be disabled.  
12 If the impairment is not one conclusively presumed to be  
13 disabling, the evaluation proceeds to the fourth step, which  
14 determines whether the impairment prevents plaintiff from  
15 performing work which was performed in the past. If a plaintiff  
16 is able to perform previous work, that Plaintiff is deemed not  
17 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At  
18 this step, plaintiff's residual functional capacity ("RFC")  
19 assessment is considered. If plaintiff cannot perform this work,  
20 the fifth and final step in the process determines whether  
21 plaintiff is able to perform other work in the national economy in  
22 view of plaintiff's residual functional capacity, age, education  
23 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
24 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

25 The initial burden of proof rests upon plaintiff to establish  
26 a *prima facie* case of entitlement to disability benefits.  
27 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
28 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is

1 met once plaintiff establishes that a physical or mental  
2 impairment prevents the performance of previous work. The burden  
3 then shifts, at step five, to the Commissioner to show that (1)  
4 plaintiff can perform other substantial gainful activity and (2) a  
5 "significant number of jobs exist in the national economy" which  
6 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
7 Cir. 1984).

#### 8 STANDARD OF REVIEW

9 Congress has provided a limited scope of judicial review of a  
10 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
11 the Commissioner's decision, made through an ALJ, when the  
12 determination is not based on legal error and is supported by  
13 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995  
14 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
15 1999). "The [Commissioner's] determination that a plaintiff is  
16 not disabled will be upheld if the findings of fact are supported  
17 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
18 (9<sup>th</sup> Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence  
19 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d  
20 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
21 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
22 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
23 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
24 evidence as a reasonable mind might accept as adequate to support  
25 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
26 (citations omitted). "[S]uch inferences and conclusions as the  
27 [Commissioner] may reasonably draw from the evidence" will also be  
28 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965).

1 On review, the Court considers the record as a whole, not just the  
2 evidence supporting the decision of the Commissioner. *Weetman v.*  
3 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v.*  
4 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

5 It is the role of the trier of fact, not this Court, to  
6 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
7 evidence supports more than one rational interpretation, the Court  
8 may not substitute its judgment for that of the Commissioner.  
9 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
10 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
11 substantial evidence will still be set aside if the proper legal  
12 standards were not applied in weighing the evidence and making the  
13 decision. *Browner v. Secretary of Health and Human Services*, 839  
14 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
15 evidence to support the administrative findings, or if there is  
16 conflicting evidence that will support a finding of either  
17 disability or nondisability, the finding of the Commissioner is  
18 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
19 1987).

#### 20 ALJ'S FINDINGS

21 At the outset, the ALJ found plaintiff met the DIB  
22 requirements through December 31, 2005. (Tr. 478.) At step one he  
23 found plaintiff engaged in substantial gainful activity from  
24 August 24, 2005 to December 23, 2005, and possibly at other times  
25 during the period of June 15, 2000, through the last insured date,  
26 December 31, 2005. (Tr. 478.) The ALJ elected to continue the  
27 analysis. At steps two and three, he found plaintiff suffers from  
28 chronic obstructive pulmonary disease (COPD), diabetes mellitus,

1 musculoskeletal impairment and hypertension, impairments that are  
2 severe but which do not alone or in combination meet or medically  
3 equal a Listing impairment. (Tr. 478-479.) The ALJ found plaintiff  
4 less than completely credible. (Tr. 481.) At step four, relying on  
5 the VE, the ALJ found plaintiff's RFC for a nearly full range of  
6 medium work (limited only by avoiding concentrated exposure to  
7 fumes and other irritants), enables him to perform his past  
8 relevant work as a truck driver. (Tr. 483.) Because the ALJ found  
9 plaintiff could perform past relevant work, he found plaintiff not  
10 disabled at step four. (Tr. 483.) Accordingly, the ALJ found that  
11 plaintiff is not disabled as defined by the Social Security Act.  
12 (Tr. 483.)

#### 13 **ISSUES**

14 Plaintiff contends that the Commissioner erred as a matter of  
15 law by failing to properly assess his credibility. (Ct. Rec. 18  
16 at 13-19.) The Commissioner responds that the ALJ appropriately  
17 weighed the evidence asks the Court to affirm his decision. (Ct.  
18 Rec. 21 at 2.)

#### 19 **DISCUSSION**

20 In social security proceedings, the claimant must prove the  
21 existence of a physical or mental impairment by providing medical  
22 evidence consisting of signs, symptoms, and laboratory findings;  
23 the claimant's own statement of symptoms alone will not suffice.  
24 20 C.F.R. § 416.908. The effects of all symptoms must be  
25 evaluated on the basis of a medically determinable impairment  
26 which can be shown to be the cause of the symptoms. 20 C.F.R. §  
27 416.929. Once medical evidence of an underlying impairment has  
28 been shown, medical findings are not required to support the



1 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d  
2 341, 345 (9<sup>th</sup> Cir. 1991).

3 It is the province of the ALJ to make credibility  
4 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9<sup>th</sup> Cir.  
5 1995). However, the ALJ's findings must be supported by specific  
6 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9<sup>th</sup>  
7 Cir. 1990). Once the claimant produces medical evidence of an  
8 underlying medical impairment, the ALJ may not discredit testimony  
9 as to the severity of an impairment because it is unsupported by  
10 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9<sup>th</sup> Cir.  
11 1998). Absent affirmative evidence of malingering, the ALJ's  
12 reasons for rejecting the claimant's testimony must be "clear and  
13 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9<sup>th</sup> Cir. 1995).  
14 "General findings are insufficient: rather the ALJ must identify  
15 what testimony not credible and what evidence undermines the  
16 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*  
17 *Shalala*, 12 F. 3d 915, 918 (9<sup>th</sup> Cir. 1993).

18 Applying the higher standard, the ALJ's reasons for finding  
19 plaintiff less than credible are clear and convincing<sup>2</sup>.

20 Plaintiff contends that the ALJ failed to properly assess his  
21 credibility. (Ct. Rec. 18 at 13-19.) The ALJ stated:

22 There are many inconsistencies between the claimant's  
23 statements and the objective medical evidence that  
24 undermine the claimant's credibility. The claimant  
testified that he stopped working in May 2000, but  
the record indicates otherwise. The claimant worked at

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27 It is debatable whether the lower standard applies, since a  
28 review of the record reveals arguably affirmative evidence of  
malingering and that plaintiff worked at substantial gainful  
activity levels during the alleged period of disability.

substantial gainful activity levels from August 2005 through December 2005, earning \$10,395 in 5 months. Although the claimant argues that this was an unsuccessful work attempt because he stopped working because he couldn't do the work, the record indicates that he stopped working when the harvest was done, not due to his impairments. Exhibit 13F/52. The record also indicates that the claimant did not stop working in May 2000, but continued to work throughout the period prior to December 2005. The record shows that in May 2001, the claimant was working as a trucker and in transient [sic] through Arizona. Exhibit 1F. In June 2002, the claimant was in Arizona. Exhibit 7F/92. In July 2003, the claimant was noted to be a long haul truck driver and had been hospitalized in Virginia in February 2003. Exhibit 5 F/2. He was in Virginia again in April 2003. Exhibit 7F/86. In October 2003, the claimant was again in Arizona. Exhibit 7F/95. In February 2005, the claimant was in Illinois. Exhibit 13F/31. In March 2005, it was noted that the claimant had been in Arizona and Mexico, and he worked for Washington State Migrant Country. Exhibit 11F/6. The claimant was in Arizona again in April and June 2005. Exhibits 13F/33 and 46.

This activity is inconsistent with the claimant's allegations that he could not and did not work during that period. Moreover, **the record shows that the claimant's neck impairment, diabetes, lung injury and asthma all existed prior to the date that he alleges his disability began and he was able to engage in substantial gainful activity in spite of them.** The medical evidence does not show there was a worsening of his condition prior to December 2005. **Thus the [ALJ] may reasonably conclude that these impairments are not disabling and do not prevent the claimant from working.** The claimant alleged he couldn't drive a truck anymore because his neck

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September 2005, the claimant was examined by Catherine Dinglasan, M.D., and the claimant did not mention neck pain. Exhibit 13F/47. In fact, there's very little mention of neck pain in any of the claimant's medical records. In addition, the claimant was able to pass a Department of Transportation physical in 2005. It is also noted that in October 2003, the claimant stated that he could walk 30 minutes, stand 2 hours, sit 8 hours, and lift 30 pounds<sup>3</sup>, but a few months later he claimed he could only walk 10-15 minutes, stand 15-20 minutes, and lift 10 pounds. Exhibits 6E and 8E. There is no medical explanation for this rapid decline in his condition, which causes the [ALJ] to question the claimant's credibility.

(Tr. 481-482) (emphasis added).

The ALJ relied on several factors when he assessed credibility: inconsistent statements, activities inconsistent with the degree of impairment alleged, including the ability to work, and medical evidence inconsistent with the severity of the complaints.

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Plaintiff's assertions of more robust capabilities (Exhibit 8E at Tr. 108-112) is undated but the ALJ assigns it "October 2003." The other exhibit the ALJ refers to (6E at Tr. 94-98) is dated February 6, 2004. Based on the Court's review of the record, the approximate date assigned by the ALJ appears circumstantially based, reasonable, and in any event harmless since the evidence does not support plaintiff's claimed dire impairments.

1 The ALJ observes several treating and examining physicians  
2 indicate three of plaintiff's conditions are well controlled with  
3 medication: hypertension, diabetes, and, after plaintiff quit  
4 smoking<sup>4</sup> and used inhalers, COPD. (Tr. 482).

5 The ALJ opines plaintiff's ability to work indicates adequate  
6 functioning overall and diminishes his credibility. (Tr. 481.)  
7 This opinion is fully supported by plaintiff's ability to work at  
8 SGA levels for 4 months in 2005 prior to his date last insured. At  
9 the second hearing plaintiff described the work as long haul  
10 driving of "heavy diesel trucks, 18-wheelers." In addition to  
11 driving, plaintiff loaded and unloaded, chained and unchained, put  
12 on and removed tarps, and used a small jack to shift the weight,  
13 insuring the load was level on all axles. He had no assistance in  
14 his work. (Tr. 627-628.)

15 At the second hearing plaintiff testified he worked 3-4 weeks  
16 in the winter of 2006 backing up trucks for seven to eight hours a  
17 day. (Tr. 635-637.) The season ended. Plaintiff stated he could  
18 not do another harvest. (Tr. 637.) Although the more recent work  
19 post-dates plaintiff's last insured date (December 31, 2005), it  
20 supports the ALJ's credibility assessment.

21 The ALJ observes two of many occasions plaintiff's complaints  
22 are not supported by the objective medical evidence: (1) plaintiff  
23 passed a DOT examination in 2005 for his CDL, and (2) though he

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Plaintiff testified at the second hearing that he had not  
smoked since he was a teen (Tr. 630). Medical records indicate  
otherwise. See e.g., (1) on May 22, 2001, the medical plan is to  
stop smoking (Tr. 123); (2) "smokes 1-2 sticks a day" and has no  
difficulty breathing (November 11, 2001 at Tr. 278); and (3)  
"continues to smoke and not ready to quit;" no complaints of  
shortness of breath (January 2, 2002 at Tr. 279).

1 reported markedly worse symptoms over a short period of time, no  
2 medical evidence supports his claim of a worsened condition. (Tr.  
3 481.)

4 Credibility determinations bear on evaluations of medical  
5 evidence when an ALJ is presented with conflicting medical  
6 opinions or inconsistency between a claimant's subjective  
7 complaints and diagnosed condition. See *Webb v. Barnhart*, 433 F.  
8 3d 683, 688 (9<sup>th</sup> Cir. 2005).

9 The ALJ's reasons for finding plaintiff less than fully  
10 credible are clear, convincing, and fully supported by the record.  
11 See *Thomas v. Barnhart*, 278 F. 3d 947, 958-959 (9<sup>th</sup> Cir.  
12 2002)(proper factors include inconsistencies in plaintiff's  
13 statements, inconsistencies between statements and conduct, and  
14 extent of daily activities).

15 The ALJ is responsible for reviewing the evidence and  
16 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
17 *Bowen*, 881 F. 2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
18 trier of fact, not this court, to resolve conflicts in evidence.  
19 *Richardson*, 402 U.S. at 400. The court has a limited role in  
20 determining whether the ALJ's decision is supported by substantial  
21 evidence and may not substitute its own judgment for that of the  
22 ALJ, even if it might justifiably have reached a different result  
23 upon de novo review. 42 U.S.C. § 405 (g).

24 The ALJ's assessment of plaintiff's credibility is supported  
25 by the record and free of legal error.

#### 26 CONCLUSION

27 Having reviewed the record and the ALJ's conclusions, this  
28 court finds that the ALJ's decision is free of legal error and

1 supported by substantial evidence..

2 **IT IS ORDERED:**

3 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 20**) is  
4 **GRANTED.**

5 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 17**) is  
6 **DENIED.**

7 The District Court Executive is directed to file this Order,  
8 provide copies to counsel for Plaintiff and Defendant, enter  
9 judgment in favor of Defendant, and **CLOSE** this file.

10 DATED this 3rd day of September, 2009.

11 s/ James P. Hutton  
12 JAMES P. HUTTON  
13 UNITED STATES MAGISTRATE JUDGE  
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